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# Multiple Parents/Multiple Fathers

Nancy E. Dowd

*University of Florida Levin College of Law*, [dowd@law.ufl.edu](mailto:dowd@law.ufl.edu)

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## Multiple Parents/Multiple Fathers

Nancy E. Dowd\*

Multiple parents, especially multiple fathers, are a social reality but not a legal category.<sup>1</sup> The assumption that every child has, or should have, two, but

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\* Chesterfield Smith Professor of Law, Levin College of Law, University of Florida. This paper was first presented at the University of Oregon School of Law at a conference organized by Professor Leslie Harris, "Protecting Children's Need for Nurturance: Proven Strategies and New Ideas," April 24–25, 2006. Professor Harris organized a lively and thought-provoking conference that ultimately led to this written symposium. I am grateful for her leadership and the dialogue sparked by the conference, including conversations with Melanie B. Jacobs, June Carbone, Marsha Garrison and Professor Harris. I have also benefited from discussions with my colleagues Lee Ford Tritt and Barbara Bennett Woodhouse. I have been assisted in the research of this article by Kristeen Witt.

<sup>1</sup> There are a number of indicators of these social realities. In 2001, "[f]ifteen percent of children (10.6 million) lived in blended families. About half of these children, 5.1 million, lived with at least one stepparent." ROSE M. KREIDER & JASON FIELDS, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, *Living Arrangements of Children: 2001*, at 2 (2005) available at <http://www.census.gov/prod/2005pubs/p70-104.pdf>. "Families with stepparents . . . are an increasingly large component of two-parent families"—9% in 1991, 10% in 1996, and 11% in 2001. *Id.* Stepparents generally have no legal status unless they formally adopt their stepchildren, although their income may be considered for some purposes, such as calculation of financial status for educational loans or available resources for child support. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1311–14 (2005).

In addition, 3% of children lived in two-parent homes with their unmarried mother and father, and 5.4 million children in 2001 lived with a biological parent who was not married to their partner. KREIDER & FIELDS, *supra* note 1, at 2.

The Uniform Parentage Act attempts to establish a single legal father of a child, but recognizes many potential categories of father including adoptive parents, cohabiting partner of the natural mother, the natural mother's spouse, a man who lives with the child and holds the child out as his natural child, or a man who has acknowledged his paternity in writing. UNIF. PARENTAGE ACT, § 3-4, 9B U.L.A. 295 (amended 2002); see also R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 231–34 (2000); Note, *Developments in the Law: The Law of Marriage and Family, Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2052 (2003). A recent high-profile celebrity case of two men claiming fatherhood involves the daughter of Anna Nicole Smith. See *Former Boyfriend Files Lawsuit Claiming Paternity of Anna Nicole Smith's Daughter*, THE AMERICA'S INTELLIGENCE WIRE, Oct. 3, 2006, [http://www.accessmylibrary.com/coms2/summary\\_0286-18863758\\_itm](http://www.accessmylibrary.com/coms2/summary_0286-18863758_itm).

only two, parents remains a core operating assumption of family law.<sup>2</sup> Yet at the same time, our knowledge of the existence of multiple fathers, whether birthfathers, stepfathers, psychological fathers or other categories, has found some reflection in cases that have granted some relational rights to fathers who do not fill the single place allotted for "legal father."<sup>3</sup> I propose in this article that it is time to think not if, but how, to recognize multiple fathers within the broader need to recognize multiple parents. The particular parenting patterns of fathers provide a window into thinking through the ways multiple parenting might work.<sup>4</sup> While men's ability to nurture children is no different than women's ability to nurture children, the general patterns of most fathers remain quite distinctive from the general patterns of most mothers.<sup>5</sup> This asymmetric difference should not be ignored in devising rules and principles intended to benefit children, even as we might differ over why this is so, whether it is essential to change these patterns, or what change is desirable.

I would first propose a framework for consideration of the principle of multiple parents: (1) the channelling function of family law, and (2) the relationship between law and culture, particularly family law and culture. Fifteen years ago Carl Schneider, wrote about the "channelling function" in family law, the means by which "the law recruits, builds, shapes, sustains, and promotes social institutions."<sup>6</sup> Schneider did not say this is the only function of family law. He identified five functions: protective; facilitative (law as a means for people to "organize their lives"); arbitratative (law as a means to "resolve disputes"); expressive (law as discourse, "imparting ideas through words and symbols"); and channelling (law as creating or supporting valued social

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<sup>2</sup> Most famously, this was the basis for the Supreme Court's decision in *Michael H. vs. Gerald D.*, 491 U.S.110 (1989), which noted that society's "traditions have protected the marital family." *Id.* at.125. It is the underlying assumption, also, of the Uniform Parentage Act. See § 3-4, 9B U.L.A. 295 (amended 2002) ; see also Suzanne Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1968-69 ("[T]he preference for mother-father parental units [is] 'one of those unprovable assumptions.'")

<sup>3</sup> For legal standards used to recognize parents or allow visitation by individuals other than the biological or adoptive parents of a child, see the following cases: *Knott v. Holtzman*, 516 U.S. 975 (1995); *Spells v. Spells*, 378 A.2d 879 (Pa. Super. Ct. 1977); *T.B. v. L.R.M.*, 890 A.2d 1060 (Pa. 2005); *A.F. v. D.L.P.*, 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001); *V.C. v. M.J.B.*, 725 A.2d 13, 20 (N.J. Super. Ct. App. Div. 1999); *In re H.S.H.K.*, 533 N.W.2d 419, 421 (Wis. 1995). For a general discussion and citation of more of these cases, see John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 363-67 & nn.105-37 (1998)..

<sup>4</sup> See *infra* notes 44-64 and accompanying text. For an extended discussion of the patterns of fathers and an argument for defining fatherhood as nurture, see NANCY E. DOWD, *REDEFINING FATHERHOOD* (2000).

<sup>5</sup> See *infra* notes 47-54 and accompanying text.

<sup>6</sup> Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992).

institutions).<sup>7</sup> The channelling function promotes societal values. In its channelling function, law operates at the macro level rather than in an individualistic, local, contextual way.<sup>8</sup>

Schneider identifies how channelling works in a variety of ways. First, the state can “recogniz[e] and endors[e] institutions” (like civil marriage).<sup>9</sup> Second, the state can “reward [people for their] participation in an institution” or status (again, marriage rewards).<sup>10</sup> Third, competing institutions can be disfavored (e.g., until recently, cohabitation without marriage).<sup>11</sup> Fourth, people can be penalized or coerced for not using the institutions, although Schneider finds it difficult to give examples of this.<sup>12</sup>

Schneider also concedes that the channelling function of law has its down sides. Other alternatives may be badly treated, for one.<sup>13</sup> Or, channelling may only be mildly successful, because it is so rarely coercive.<sup>14</sup> But he argues that channelling nevertheless is important, because it often reflects and facilitates cultural norms, even if those norms are in transition. The two examples he uses to illustrate the channelling function of family law are marriage and parenthood.<sup>15</sup>

Schneider argues that more commonly law supports, rather than creates, social institutions that reflect core values or principles. I would agree. As I have previously argued, I believe law more often reflects and follows culture than vice versa.<sup>16</sup> Particularly in family law, it seems that more often culture is far ahead of, and ultimately changes, law. Law rarely, or with great difficulty, changes culture, although legislators continue to try to make law serve this role.<sup>17</sup>

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<sup>7</sup> *Id.* at 497–98.

<sup>8</sup> Barbara Bennett Woodhouse has recently detailed a comprehensive view of the functioning of children and families from the macro to the micro level, explicitly combining her generist approach with environmental perspectives, creating an ecogenerist model. See Barbara Bennett Woodhouse, *Cleaning Up Toxic Violence: An EcoGenerist Paradigm*, in HANDBOOK OF CHILDREN, CULTURE AND VIOLENCE 415–33, (Nancy E. Dowd et al. eds., 2006); Barbara Bennett Woodhouse, *Reframing the Debate about the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85.

<sup>9</sup> Schneider, *supra* note 6, at 503.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 504.

<sup>13</sup> *Id.* at 505–06, 519–20. Alternative institutions are disadvantaged by imposing criminal sanctions, or by withholding the state’s approval for the institution.

<sup>14</sup> *Id.* at 519.

<sup>15</sup> *Id.* at 502–05.

<sup>16</sup> Nancy E. Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI-KENT L. REV. 785, 786 (2002).

<sup>17</sup> *Id.* at 791. For example, movement in family law to a gender-neutral idea of parenthood has not changed the gender-skewed custody and care patterns of children.

Law is part of cultural discourse, either as a hindrance to social change or as affirmative support for change. As is particularly evident in family law, law is not neutral.<sup>18</sup> I have argued that where the law acts in a way that resolves cultural conflict, two principles should be used: the antisubordination principle and the limited instrumentalism principle.<sup>19</sup>

Under the antisubordination principle, law should adopt rules that do not subordinate individuals or families.<sup>20</sup> If law's power is exercised, as discourse, rights, or coercion, we should ask who benefits from that power and what results occur.

Under the limited instrumentalism principle, in recognition of the limited role of law in social and cultural change, we should ask whether we are trying to impose a rule that is ahead of cultural values.<sup>21</sup> Or, put differently, we should not ask law to accomplish social change that society is unwilling to support. "Mere legal rules, without affirmative and meaningful support, can be undermined by power, culture, or both."<sup>22</sup>

In summary, when considering whether to embrace, and how to embrace, the notion of multiple parents, and in particular, multiple fathers, it is helpful to consider (1) the channelling function of family law, and (2) how law and culture intersect. We should evaluate any proposed resolution against the antisubordination principle (that is, whether the adoption of multiple-parenthood reflects subordination or liberation) as well as the limited instrumentalism principle (are we trying to accomplish social change that does not have cultural support, or support social change that the culture already embraces).

What I explore in this article is how multiple-parenthood, and particularly multiple-fatherhood, might work. I have more questions than answers because once you get beyond the initial principle, the devil is in the details. I also hope that thinking about this from the perspective of the channelling function of family law, as well as the relationship between law and culture, is helpful to finding the answers about how the principle of multiple-parenthood, and specifically multiple-fatherhood, might work. I conclude that the general principle of multiple-fatherhood is supported by the channelling function of

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<sup>18</sup> *Id.* at 785. Two of the most notable recent examples of this are *Troxel v. Granville*, 530 U.S. 57 (2000), and *Lawrence v. Texas*, 539 U.S. 558 (2003), both of which evaluated statutes that take a clear position on family matters. In *Troxel*, the Court evaluated a broad third-party visitation statute, and a plurality held that as-applied, the statute violated fundamental parental rights strongly supported under constitutional substantive due process doctrine. See 530 U.S. at 72 (plurality opinion). In *Lawrence*, the Court considered a state statute criminalizing sodomy and held it violated personal guarantees of personal liberty in adult intimate relationships. 539 U.S. at 578.

<sup>19</sup> Dowd, *supra* note 16, at 787.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

family law, as well as the law's role to support affirmative cultural change. It does not offend the antistatutory principle nor does it conflict with the limited instrumentalism principle. In essence, we already practice multiple-fatherhood, for the benefit of children, but multiple-fatherhood is not always as strongly supported as it might be to further children's positive outcomes. The far more difficult issue is how to *implement* multiple-fatherhood. In Part I of this article I look at the context of fatherhood. In Part II, I suggest the range of possible models of multiple-fatherhood, and advocate a model of shared but unequal coparenting with a core father. In Part III, I consider some issues regarding implementation of this model. I conclude by returning to the law's channelling function and measuring the law's role in relation to culture.

## I. THE PRACTICE OF FATHERHOOD: PATTERNS AND CONTEXT

### A. *Fatherhood as Nurturing*

The core principle of parenting, in my view, is nurture. Thus in my prior writing on fathers, I have argued that the legal system should move from a definition of fatherhood based on genetics, marriage, or economic support to a definition centered on care.<sup>23</sup> I have advocated defining fatherhood as nurture. Nurture should include not only the practice of caring for children, but also the practice of cooperation with other caregivers.<sup>24</sup> It has both qualitative and quantitative components. "Social fatherhood is the practice of nurture, either alone or in combination with other caretakers, as the sole or primary parent, or contributing as closely as possible to an equal amount of caregiving in partnership with the other primary parent or parents. It is non-exclusive, cooperative parenting."<sup>25</sup> Nurture should be defined in a very rich way, including the psychological, physical, intellectual, and spiritual care of children. It should be developmentally related, and therefore fluid, not fixed, to fit the particular child's needs as well as their developmental stage. Qualitatively, it includes both children's well being and the well being of other caretakers, and therefore is interconnected with other household work, and the balance of wage work and family work. Quantitatively, I have defined this as shared responsibility, as close to fifty-fifty as possible, but no less than sixty-fourty (or proportionate to the presence of other caregivers).<sup>26</sup> Implicit in my norm of nurture is commitment to the child that is sustained throughout the child's lifetime.

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<sup>23</sup> DOWD, *supra* note 4, at 213. See generally Barbara Bennett Woodhouse, *Hatching the Egg: A Child Centered Perspective on Children's Rights*, 14 CARDOZO L. REV. 1747 (1993) (advocating a generist definition of parentage grounded in nurture).

<sup>24</sup> DOWD, *supra* note 4, at 177-78.

<sup>25</sup> Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1312 (2005).

<sup>26</sup> DOWD, *supra* note 4, at 175-76, 218.

As part of this definition of fatherhood, I have advocated that we adopt a principle that a child may have multiple parents, not simply two.<sup>27</sup> I have done so based on the life patterns and care patterns of fathers. Unlike the dominantly linear care patterns of mothers, who parent their children throughout their childhood, fathers frequently engage in serial parenting linked to the households that they share with partners, which is tied to patterns of greater non-marital childbearing and divorce, as well as the continued dominance of women as the primary caregivers of children.<sup>28</sup> Fathers therefore nurture children as they live with them, and sometimes they engage in parenting children located in more than one household at the same time.<sup>29</sup> Children may have a father as a constant nurturing presence, but a significant number of children may experience a series of fathers or several fathers at the same time.<sup>30</sup> Yet another portion of children have no nurturing father at all.<sup>31</sup> Because of men's nurturing patterns, and children's experience of men's nurture, recognizing multiple-parenthood makes sense, for men and children.

More recently, I have been asked to answer the question of how parentage should be determined at birth.<sup>32</sup> The legal designation of "parent" might seem most logically at birth to fit a child's genetic parents (leaving aside for the moment the permutations possible through the use of reproductive technologies).<sup>33</sup> However, the legal choices also include designation of fatherhood by marriage (the mother's marital partner at birth is the father),<sup>34</sup> or designation of fatherhood by conduct (identifying the social father(s)).<sup>35</sup> I would argue even at birth legal designation of fatherhood should be governed by nurture and include the principle of multiple-parenthood.<sup>36</sup>

Clearly at birth, sometimes the genetic and social father is the same person, and he is married to the mother. But just as clearly, the genetic father and the social father might not be the same person, and there may be a third, marital father. I have argued that nurture should define parentage and that we should look to the father's actions during the pregnancy and at childbirth to designate parentage at birth.<sup>37</sup> I am willing to presume that a genetic father is a

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<sup>27</sup> *Id.* at 219.

<sup>28</sup> *Id.* at 19–47.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* Fatherlessness in terms of the lack of an identified biological or marital or adoptive father has been the primary focus of social policy geared at insuring income support. The fatherlessness that I focus on here is the lack of a *social* father.

<sup>32</sup> See Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909 (2006).

<sup>33</sup> *Id.* at 909.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 913.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 917–22.

social father, subject to rebuttal.<sup>38</sup> To that extent I am willing to give genetics an edge or recognition at the moment of birth, if it is essential to determine or designate parentage at that moment. At the same time, a purely social father should be recognized if he demonstrates nurture of the child. If there are two social fathers, both would be recognized; if there was a genetic and social father, genes would not trump care.<sup>39</sup> Rather, allowing for multiple fathers obviates the necessity to choose one person to take the single legal place available.

The factors that would establish a social father at birth would include the actions of the father during the pregnancy, his presence at the birth, and his intention to care for the child, reflected in his acknowledgment of paternity and the consent of the mother.<sup>40</sup> Subsequent to the birth, it is possible that a child would have additional social fathers, for example one or more stepfathers.<sup>41</sup>

A genetic father should have an economic duty of support,<sup>42</sup> but only a social father should claim the full rights of fatherhood, based on a record and ongoing performance of care/nurture. Therefore fatherhood would not be a single, unitary status with complementary rights and responsibilities, but rather could include multiple adults who may or may not have equal status.<sup>43</sup> In this article I move away from a focus at the moment of birth, and explore more fully how multiple fathers might be defined over the life course of the child.

Multiple-parenthood, in theory, seems simple and easy to define. The underlying principle is not difficult to articulate: "More is better," when the more is nurturing parents and nurture includes positive relationships with children and other caretakers. Or, the principle might be stated as "love the one you're with"—multiple-parenthood might recognize the patterns of successive parenting and support the parent who is there, doing the work of nurture. We might be concerned, however, to ensure consistency and reliability for children, rather than imagining parenthood as something one could accept and then pass off to another. In addition, if there are multiple parents, we might worry about the relationships among them. So as with most things in family law, a singular principle rarely works; it is always modified by "it depends." That challenge can best be seen by looking at fathers and children, their lived patterns of nurture, and identifying the questions raised by this context.

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<sup>38</sup> *Id.* at 922–27.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> This economic duty is grounded in responsibility for bringing a child into the world, and the child's inevitable dependency.

<sup>43</sup> Dowd, *supra* note 32, at 927–28.



*B. The Context of Fatherhood: Patterns of Care*

It is important to think of multiple-fatherhood not in the abstract, but rather in the context of how fatherhood, in general terms, is practiced.<sup>44</sup> Most men become fathers, in the genetic sense, but a significant number of fathers do not engage in nurture as I have defined it. The types of fathers could be described as (1) those who nurture parallel to the typical pattern of mothers; (2) those who nurture as a backup to a primary nurturer, thus playing a secondary nurturing role; (3) those who engage in very little nurture but who are present in the household and support the family economically; (4) those who are predominantly economic fathers and do not share the household; and (5) disconnected fathers who do not have a social or economic relationship to their children.<sup>45</sup> The proportion of men who parent akin to mothers, as primary or sole nurturers, or as co-equal parents, is quite small, although the numbers have increased substantially.<sup>46</sup> Far more common is the practice of secondary parenthood to mothers as primary caregivers. What is disturbing about the data about fathers, however, is the extent of disengagement of genetic fathers from their children.<sup>47</sup>

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<sup>44</sup> Multiple-parenthood can include a variety of scenarios, but it is helpful for me to think about how it functions in the context of the parenting patterns of fathers. There are others who might view it in terms of same sex couples, stepparents of either gender, cohabitants, or other relatives like grandparents, aunts and uncles, or other extended family.

<sup>45</sup> DOWD, *supra* note 4, at 81–83.

<sup>46</sup> *Id.* Of 18.5 million children that lived with a single unmarried parent in 2001, only 2.2 million lived with their fathers; 4 million children lived with their biological mother and a stepfather compared to 815,000 that lived with their biological father and a stepmother. KREIDER & FIELDS, *supra* note 1, at 2.

<sup>47</sup> DOWD, *supra* note 4, at 83. The percentage of children under the age of eighteen living with two married parents decreased from 85% to 68% from 1970 to 1996. CHILDREN'S DATA BANK, FAMILY STRUCTURE, <http://www.childtrendsdatabank.org/indicators/59familystructure.cfm>. The percentage of children living in mother-only families has increased from 11% in 1970, to 24% in 1997 and 23% in 2005. *Id.* In 2005, only 35% of black children lived with both parents. *Id.* In a study of children born in 2001, by nine months of age, one in five children lived in a household without a father. KRISTIN DENTON FLANAGAN & JERRY WEST, CHILDREN BORN IN 2001: FIRST RESULTS FROM THE BASE YEAR OF THE EARLY CHILDHOOD LONGITUDINAL STUDY, BIRTH COHORT (ECLS-B) 32 (2004), available at <http://nces.ed.gov/pubs2005/2005036.pdf>. Of these children, only 40% had contact with their father on the day of the study interview. *Id.* Thirteen percent of the children had never seen their father. *Id.* After divorce, involvement of noncustodial fathers typically declines over time. TERRY ARENDELL, CO-PARENTING: A REVIEW OF THE LITERATURE, NATIONAL CENTER ON FATHERS AND FAMILIES 16 (1996), available at <http://www.ncoff.gse.upenn.edu/litrev/co-litrev.pdf> Only 25% of children see their noncustodial father at least weekly. *Id.*

A second significant pattern in men's fathering is the degree to which men parent serially based on the person with whom they share their household.<sup>48</sup> In other words, if men do not remain married or cohabiting with the mother of their children, the lack of household connection is reflected in a pattern of diminishing nurture of children. When they remarry or cohabit with another partner, however, men will commonly nurture the children in the new household (whether stepchildren or genetic children).<sup>49</sup> It is possible then, given marriage and divorce rates, that men may father several groups of children, as a genetic parent, marital parent or purely as a social parent, but their tendency is to do so serially, rather than multiply nurture all children with whom they have a connection.<sup>50</sup> Thus, for example, a man who marries, divorces, and remarries might diminish his connection to the children of his first marriage, maintain a strong relationship with the children born during his second marriage, and might socially coparent stepchildren in the household of the second marriage. Less common is the pattern of a man socially coparenting all children that he has fathered, whether they are in his household or not.<sup>51</sup>

Some of these patterns are not solely the consequence of choice. They are strongly affected by men's relationships to women, who often are gatekeepers to men's relationships with their children, and they are also affected by the degree to which the workplace supports fatherhood and the courts support engaged social fatherhood.<sup>52</sup>

The serial parenting pattern of many fathers contrasts significantly with the linear parenting pattern of mothers, although mothers as well may have more tenuous connections with children not in, or no longer in, their household, such as stepchildren.<sup>53</sup> The asymmetry of mothers and fathers is a stark reality that translates into social assumptions about the differential abilities of fathers as compared to mothers. In fact men can and do parent as well as women do, but we either assume incompetence or lavishly praise ordinary care.<sup>54</sup>

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<sup>48</sup> DOWD, *supra* note 4, at 82–84.

<sup>49</sup> *Id.* at 64–65. Most stepfathers “perceive themselves as having a positive fatherlike role-identity.” William Marsiglio, *Stepfathers With Minor Children Living at Home: Parenting Perceptions on Relationship Quality*, 13 J. FAM. ISSUES 195, 204 (1992).

<sup>50</sup> DOWD, *supra* note 4, at 65.

<sup>51</sup> *Id.* at 63–65.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 26–31. On mothering patterns and practices generally, see: MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); and Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992).

<sup>54</sup> On the challenges of fathers related to stereotypes, see Martin Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1089 (1994) which explains how gender stereotypes often discourage men from taking advantage of parental leave. *See also* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 759

Fathers matter to children because nurture matters. They also matter because father presence correlates to greater economic resources, in general, and that has an enormous impact on children.<sup>55</sup> The presence of fathers also confers psychological and intellectual benefits as well that link particularly to the presence of additional nurturing adults, not some essentialist genetic uniqueness linked to men.<sup>56</sup> Because men link so strongly to economic resources that impact outcomes for children, there are significant differences by class and race among fathers, since economic opportunity is affected by those two factors.<sup>57</sup>

Class and race also affect the way men father. Class, for instance, makes it far more likely that men will co-equally nurture when they are blue collar workers.<sup>58</sup> Dividing care by split shifts is the classic example of this. Race impacts fatherhood because different traditions of masculinity impact on the ideal image or role of father.<sup>59</sup> Men of color, for example, face a greater challenge successfully helping their children, and particularly their boys, develop and grow within a racist society, while at the same time benefiting from cultural norms of community care.<sup>60</sup>

Contemporary patterns of fatherhood in the U.S. are sharply divergent from an ideal that each child have *a* father, much less more than one. But those patterns also suggest that we fail to recognize all nurture that men provide. What better way to encourage more nurture than to value it where and when it occurs, while simultaneously advocating that fatherhood imposes a lifetime fiduciary relationship. Serial fatherhood benefits children as compared to fatherlessness or father presence without nurture. But serial fatherhood should be viewed as distinctly secondary to a preferred model of fatherhood as a lifetime commitment.

I have suggested previously that the current context suggests a range of questions, if our goal is to increase the nurture of children while also increasing social fathering for men's own sake.<sup>61</sup> (1) Do we work with the

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(2000) (discussing how gender norms play a role in determining who takes leave under the current Family Medical Leave Act).

<sup>55</sup> DOWD, *supra* note 4, at 84.

<sup>56</sup> *Id.* at 85.

<sup>57</sup> *Id.* at 84.

<sup>58</sup> *Id.* Parents with less income and less education are more likely to work alternating schedules to care for children. "Co-parenting... appears to occur predominantly in middle and middle-upper class families." ARENDELL, *supra* note 47, at 16; *see also* HEATHER BOUSHEY, CENTER FOR ECONOMIC AND POLICY RESEARCH, TAG-TEAM PARENTING USED BY LOWER-INCOME, LESS-EDUCATED WORKERS *passim* (August 2006) (discussing how primarily low-income parents "work alternating schedules so that each parent can be home to care for the children while the other parent is at work"), [http://www.cepr.net/documents/work\\_schedules\\_2006\\_08.pdf](http://www.cepr.net/documents/work_schedules_2006_08.pdf).

<sup>59</sup> DOWD, *supra* note 4, at 65–74.

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 157–62.

patterns that we have or try to change them? (2) Should fatherhood be supported exclusively or preferentially within marriage? (3) How do we empower fathers without subjugating mothers? (4) Do we envision fatherhood as a single-parent or dual-parent role? (5) Can we support nurturing fatherhood while insisting on financial responsibility? Will we continue to see financial responsibility in individual, and unequal, terms? And (6) how do we incorporate the fluidity and multiplicity of family structures and changes over time?

Briefly, my answers to these questions are grounded in the importance of nurture.<sup>62</sup> We should work with the patterns that we have but not accept the idea that fatherhood is about genes or dollars. Nurture should be strongly supported, but rights should attach only when nurture approaches the qualitative and quantitative measures that signify a complete embrace of the fiduciary responsibilities of parents to children. Non-marital cohabitation is so pervasive<sup>63</sup> that privileging marital fatherhood makes no sense for children. Ensuring that supporting fathers does not derogate mothers requires that we always “ask the other question,” such as how will this affect mothers when rules or structures are put in place to help fathers? I have argued that fathers should be coequals, not secondary parents, or the meaning of nurture is unacceptably diluted. We can demand economic responsibility of those who have the ability to pay and support their children, but it is clear we cannot expect that to pull most poor children out of poverty.<sup>64</sup> Finally, we can account for changes in family structure by focusing on function rather than form. Multiple fathers answers the question of whether we should support more than one father for each child, but the presence of multiple fathers has an impact on these other questions as well.

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<sup>62</sup> See *id.* at 179–80. For a more general and thorough discussion on the importance of nurture, see *id.* at 157–231..

<sup>63</sup> In 2003, 4.2% of households classified themselves as unmarried partner households compared to 2.9% in 1996. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 16 (Nov. 2004), *available at* <http://www.census.gov/prod/2004pubs/p20-553.pdf>. Forty-one percent of these households had children under the age of 18. *Id.* at 17.

<sup>64</sup> See ELAINE SORENSEN & CHAVA ZIBMAN, CHILD SUPPORT OFFERS SOME PROTECTION AGAINST POVERTY. NATIONAL SURVEY OF AMERICA’S FAMILIES, THE URBAN INSTITUTE, SERIES B, NO. B-10, at 2 (March 2000) (“Child support lifts about half a million children out of poverty . . .”), *available at* <http://www.urban.org/uploadedPDF/b10.pdf>. Seventy percent of poor children with a non-resident parent do not receive child support. *Id.* at 4. These children’s non-resident parents tend to be those for whom child support payments would be a particular hardship. *Id.*

*C. Implications of the Social Context for Defining Multiple Fathers*

As our social context indicates, many children have no father. Thus, the problem is not multiple fathers, but none at all. Many children's biological fathers are unidentified and/or they have no social fathers whatsoever. Increasingly, paternity establishment rates are rising so that we can anticipate that a biological father could be identified for all or most children.<sup>65</sup> Establishment of paternity does not, however, ensure either economic support or social fatherhood. Certainly our goal should be that children have both: adequate economic support and nurturing.<sup>66</sup>

In other contexts of fatherhood, however, a child might have more than one social father, either at the same time, or seriatim. If the fathers can work collaboratively with other caregivers, mothers or fathers, then it makes sense to support the notion of multiple fathers. In some scenarios, there may be a biological father, or a father deemed the legal father by paternity law, as well as a social father. In other words, the multiple fathers may not all be social fathers. Multiple-fatherhood should obviate the scenario where a legal father, the sole father, is not a social father to a child, and the social father has no legal standing. This kind of scenario sometimes becomes evident only in tragedy; in the aftermath of September 11th, some children ended up with legal parents who were not their social parents, while their social parents had no legal standing.<sup>67</sup> At the same time, there were children who grieved for their social parents but who were not legally recognized as their "children."<sup>68</sup>

Multiple-fatherhood might have several meanings, especially given the context of fatherhood as currently lived and practiced. The variations could include: (1) multiple nurturers, simultaneously parenting; (2) multiple successive nurturers, parenting seriatum; or (3) multiple fathers, not all of whom are nurturers, or not all of whom nurture equivalently. In this last variation, some of the fathers (genetic, marital, or a non-marital partner of the mother) are not social fathers, but have either rights or obligations or may simply be present in the household due to their relationship with the mother. Finally, among social fathers, there might be coequal or unequal nurturers.

Consistent with my core principle of parenting that nurture is the key organizing principle of parenthood, multiple-parenthood must work on a functional basis.<sup>69</sup> If fatherhood is described in this way, and given the

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<sup>65</sup> See Dowd, *supra* note 32, at 923.

<sup>66</sup> At the same time, it is important to emphasize that it is not essential that every child have a nurturing father, nor that all children have two parents. For an extended argument in support of the value of single parent families, on the basis that it is function, not form, that defines good families, see NANCY E. DOWD, *IN DEFENSE OF SINGLE PARENT FAMILIES* (1997).

<sup>67</sup> Dowd, *supra* note 16, at 113-20.

<sup>68</sup> *Id.*

<sup>69</sup> On functional parenting, see: Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270 (1991); Leslie Joan Harris,

variations of how multiple-fatherhood might play out, combined with the context that I have described, I believe this raises a series of questions for defining multiple-fatherhood. First, should this be a legally recognized status beyond what is available now, or is it better to leave things to informal arrangements? Could legal intervention create more harm than good, and does intervention upset the current balance of power? Second, do we imagine multiple parents as coequals or as one primary parent with one or more secondary parents? Third, how would financial responsibilities be distributed among multiple parents? Fourth, would multiple-parenthood undermine the support of nurturing fatherhood—is exclusivity needed? Finally, what existing models do we have to draw upon, and what further research would be desirable? I address these questions in the next two sections.

### III. MODELS FOR MULTIPLE-FATHERHOOD

#### A. *Benefits of a Two-Parent Model*

We already have multiple fathers. What we do not have is legal recognition of those parents or legal protection of children's relationships with those caring adults if the adults fall outside of the two *legal* parents that children are generally permitted to have.<sup>70</sup> But the first question that we must ask is whether the existing structure has benefits. Could legal intervention create more harm than good, and does it upset a balance of power which in most or many circumstances is a good one?

The benefit of a more limited set of parents has to be considered from both the perspective of the primary caretaker, usually the mother, and the child. Retaining the existing limit of two parents, coupled with implicit or explicit recognition of primary caretakers, would give deference to the primary caretaker and allow her to control the scope and number of relationships with the child.<sup>71</sup> As a non-parent, other adults would have to meet a more stringent standard to have their relationship legally protected, and the scope of the relationship might be more limited. The model here would be something like grandparent visitation or third party visitation statutes.<sup>72</sup>

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*Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461 (1997), 480–83; Melanie Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 435–36 (2005); Note, *Looking for a Family Resemblance: the Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1646–47 (1991).

<sup>70</sup> See *supra* text accompanying notes 2 and 3.

<sup>71</sup> Martha Fineman has argued for reorienting family law around the mother-child dyad in recognition of the model of care typical of most children. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

<sup>72</sup> On grandparent and third-party visitation statutes post-*Troxel*, see: James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About*

Fiona Kelly has explored this issue particularly in the context of lesbian families.<sup>73</sup> She identifies as a primary problem with multiple-parenthood the fear that a court would try to *insert* a father under the guise of expanding the primary parents, but really to include a man in the family.<sup>74</sup> Her concern is that two parents would not be viewed as enough when the two do not conform to heterosexual norms; multiple-parenthood would then be used in a perverse way, providing an indirect justification to correct perceived gender imbalance.<sup>75</sup> This feeds into assumptions about the necessity of the presence not only of two parents, but of a parent of each gender. Her analysis suggests a similar dynamic might operate when the family is a single parent family. The nuclear family norm of two legal parents then becomes a way to protect nontraditional families from state intrusion, just as norms of parental autonomy served the single parent mother in *Troxel* in resisting the demands for visitation of the grandparents.<sup>76</sup>

A similar debate continues over how to deal with cohabiting couples, complicated of course by the debate over same-sex marriage.<sup>77</sup> The

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*Their Relationship*, 11 WM. & MARY BILL OF RTS. J. 845 (2003); Sally Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where should States Draw the Line?* 32 RUTGERS L.J. 783 (2001); cf. Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14 (2003) (arguing that states should craft definite and specific rules for visitation with caring adults while maintaining the presumption in favor of parent's rights); Barbara Bennett Woodhouse & Sacha Coupet, *Troxel v. Granville: Implications for At risk Children and the Amicus Curiae Role of University-Based Interdisciplinary Centers for Children*, 32 RUTGERS L.J. 857 (2001) (arguing that scholars must ensure a child centered debate that includes the voices of children in all circumstances)

<sup>73</sup> See Fiona Kelly, *Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law*, 21 CAN. J. FAM. L. 133 (2004).

<sup>74</sup> *Id.* at 140.

<sup>75</sup> *Id.* at 172.

<sup>76</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000); see also Nancy E. Dowd, *2001 Annual Survey of Family Law: United States*, 16 INT'L J. OF L. SOC'Y & THE FAM. 439 (2002) (focusing on *Troxel* and arguing it both supports and stigmatizes single-parent families); Sally F. Goldfarb, *Visitation for Nonparents after Troxel v. Granville: Where Should States Draw the Line?* 32 RUTGERS L.J. 783, 817 (2001) ("If state law defers to the choices of married couples about who can spend time with their children, it should accord the same deference to the choices of single parents and parents living with new partners."); David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 718 (2001) (discussing how the court analyzed rights based on the role the adults play in the children's lives, and not simply on biology); Roberts, *supra* note 72, at 26 (discussing how *Troxel* affirmed the presumption that parents' decisions reflect the best interest of the child);

<sup>77</sup> For a sampling of the debate on cohabitation, see: Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation be the Legal Default Option?*, 64 LA. L. REV. 403 (2004); Marsha Garrison, *Is Consent Necessary? An Evaluation of the*

cohabitation debate ranges from the imposition of responsibilities and rights, especially if there are children,<sup>78</sup> versus arguments that no legal obligations or rights should be recognized beyond those that the parties contract to create, or which are already created by law, such as child-support obligations.<sup>79</sup> Some would argue that parties should count on the law not to impose any legal obligations, leaving them free to choose. Freedom is circumscribed by imposing obligation where none was intended to exist.<sup>80</sup> There are certainly some parallels to the question of whether multiple fathers should be legally recognized as opposed to being subject to the choice of other caretakers and/or their own choices.

This is a weighty consideration given the power dynamics of post-divorce families and the critique of joint custody as providing power without responsibility, coupled with concerns about how this operates in scenarios involving domestic violence.<sup>81</sup> On the other hand, the failure to recognize caring adults who have performed as parents ultimately harms the child and provides the adult with unlimited power that may be abused. From a children's

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*Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005); Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. & FAM. STUD. 135 (2005); Mary Jane Mossman, *Conversations about Families in Canadian Courts and Legislatures: Are There "Lessons" for the United States?*, 32 HOFSTRA L. REV. 171 (2003); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001).

<sup>78</sup> This is the Canadian model. On the Canadian model, see generally Nicholas Bala & Rebecca Jaremko Bromwich, *Context and Inclusivity in Canada's Evolving Definition of the Family*, 16 INT'L J.L. POL'Y & FAM. 145 (2002), and Robin Cheryl Miller & Jason Binimow, Annotation, *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. FED. 2d 1 (2005).

<sup>79</sup> Garrison, *supra* note 77, at 896–97..

<sup>80</sup> *Id.*

<sup>81</sup> Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 407 (2005) ; *see also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 267–70 (1992) (studying the tendency for custodial arrangements to gravitate toward traditional preferences, i.e. post-divorce most mothers had primary child care per the parties' own determination) ; Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 352–53 (2005) (arguing that the concept of joint custody was initiated by fathers' rights groups and is opposed by some women's groups who argue that the concept is a short-lived child care commitment in exchange for reduced child support and tolerates domestic violence); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1969 n.190 (2000) (noting that joint custody programs failed to change behavior because the programs "were inconsistent with [parents'] private preferences" and noting the opposition of women's groups to these programs who saw them as a "windfall for fathers" who were not primary caretakers or played minimal roles prior to divorce).



rights perspective it is indefensible.<sup>82</sup> From a developmental perspective, grounded in the value of continuity in the child's relationships, it is indefensible.<sup>83</sup> Thus, the question might more fairly be put, in order to preserve the relationships, is it necessary that de facto parents be made de jure parents, or would some other status be preferable?<sup>84</sup> The answer may lie in how we imagine multiple parents.

### *B. Models of Multiple-Parenthood*

One way to imagine multiple-parenthood is to envision multiple social parents coparenting simultaneously. My definition of fatherhood, and by extension parenthood, revolves around nurture. I have defended a definition of nurture that is both qualitative and quantitative. I have argued that fatherhood should be thought of as a much fuller role, that minimalistic or secondary caretaking is not sufficient; nurture, if shared, should be fifty-fifty, or at least sixty-forty. If that definition is carried through in this context, then only coequal nurturers, or close to that, can qualify as "parents." Otherwise, the

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<sup>82</sup> See Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmental Paradigm*, *supra* note 8, at 146.

<sup>83</sup> See also the relevant literature on child development in the context of divorce and parenting plans, such as Michael E. Lamb & Joan B. Kelly, *Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon and Biringen*, 39 FAM. CT. REV. 365, 366–69 (2001) (discussing various theories of attachment in the development of children); Judith Solomon & Zeynep Biringen, *Another Look at the Developmental Research: Commentary on Kelly and Lamb's "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children"*, 39 FAM. CT. REV. 355, 358–59 (2001) (arguing that overnight separations from the primary caregiver should be avoided at least through the 3rd year of life). See generally Dorothy G. Singer, *Developmental Variations Among Children and Adolescents—An Overview of the Research and Policy Implications*, in HANDBOOK OF CHILDREN, CULTURE AND VIOLENCE XXVII (Dowd, et al., eds. 2006) (discussing developmental stages of children).

<sup>84</sup> De facto parent is defined under the ALI principles, Section 2.03, as one who is not a legal parent "who for a period of time that is significant, in light of the child's age, developmental level, and other circumstances, has resided with the child, and for reasons primarily other than financial compensation, and with the consent of a legal parent . . . regularly has performed a majority of the caretaking functions for the child, or a share of the caretaking functions at least as great as that of the parent with whom the child primarily has lived." Principles of the Law of Family Dissolution: Analysis and Recommendations (Tentative Draft No. 3, pt. I, ALI, Mar. 20, 1998), § 2.03. For an analysis of this section, see Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769 (1999), which critiques the caretaker focus of the principles as disadvantaging many who act as parents but do not perform the particular tasks that the principles focus upon. See *id.* at 774–82. For a critique of de facto parenthood, see Gregory A. Loken, *The New "Extended Family"—"De Facto" Parenthood and the Standing Under Chapter 2*, 2001 BYUL. REV. 1045, 1048–63 (2001).

strong concept of nurture that I have argued is essential would be diluted by a looser definition of parent/father for the purpose of recognizing multiple fathers. On the other hand, multiple fathers (and mothers) raise the question of how one images "parents" beyond the conventional mother-father. If my model of "equal coparenting" is applied, then it becomes important to consider how parenting is envisioned: as a discrete set of tasks and relational pieces, a limited "pie," or as a fluid relationship that allows for more engagement as more adults are present. Additional adults might be beneficial or it might be perceived as an infringement, but that all depends on how the role of parent, and its relationship to other adults, is conceptualized. Thinking about multiple-fatherhood convinces me that the most workable model is one where core or primary parents coparent with secondary parents, who might vary considerably in the amount of nurture that they provide as backup to the core parent(s).

A number of scholars have grappled with the question of multiple-parenthood, beginning with the seminal article by Professor Katherine Bartlett.<sup>85</sup> Professor Bartlett argues for the importance and validity of the two-parent norm within the marital family.<sup>86</sup> Outside of the marital family, however, Bartlett supports a multiple-parenthood model: when there is no marriage or divorce, she argues family law should support the parenting of stepparents, non-marital fathers, foster parents, and grandparents.<sup>87</sup> She defines the circumstances under which such a parent should be legally recognized as (1) ideally, a relationship initiated by a neutral party acting on behalf of the child, not an adult acting out of adult interests; (2) with the legal status of parent based on the presence of psychological parenthood, defined as including (a) a minimum of six months physical custody, (b) mutuality (meaning the motive for care is caring for the child), (c) consent of the child's legal parent or by court order, and (d) recognition of the adult as a legal parent ultimately is in the best interests and welfare of the child.<sup>88</sup>

Other scholars have confirmed, modified, or disagreed with Professor Bartlett's model. Professor Alison Young presents a model of a core caretaker or couple, connected to other adults, which can include multiple fathers, as a model for the legal concept of "family" when children are present.<sup>89</sup> The core family unit, of one or more caretakers, has ultimate decision-making authority; other adults with a special relationship with the child have rights of access and visitation.<sup>90</sup> Young's goal is to preserve the benefits of exclusivity while also

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<sup>85</sup> Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 *passim* (1984).

<sup>86</sup> *Id.* at 883.

<sup>87</sup> *Id.* at 944-45.

<sup>88</sup> *Id.* at 944-48.

<sup>89</sup> Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 518 (1998).

<sup>90</sup> *Id.* at 512.

supporting the benefits of additional relationships.<sup>91</sup> She would not limit this to a non-nuclear or non-marital family,<sup>92</sup> so in that sense she departs from and is a critic of Bartlett. She cites as existing models of her concept the examples of joint custody, stepparent adoption, and open adoption.<sup>93</sup>

Professor Matthew Kavanagh, drawing upon Young's work, centers his notions of family around care, not exclusivity.<sup>94</sup> His model is care-based and child-centered—both appealing principles. He cites very compelling statistics to support his argument that care should govern, not structure or roles: less than 50% of children will spend their entire childhood in a two-parent married-couple biological family.<sup>95</sup> He rejects, however, Young's notion of a core family; rather, he would organize his definition around care, attention to connections, and children's needs.<sup>96</sup>

Mutual caregiving relationships, in which an adult provides for the needs of a child, should be legally recognized. The level of legal protection accorded should be appropriate for, reflective of, and limited to that which is beneficial and necessary to protect and support the established caregiving relationship. Further, the legal protection accorded should be granted in accordance with the protection for practical parental decision-making authority necessary for the life of each child.<sup>97</sup> . . . To deserve a physical custody and decision-making power, adults would have to show a relationship consistent with such a role. "Primary caregivers" or legal "parents" would be those who live with and provide for the needs of a child on a daily basis and whom the child recognizes as her full-fledged parent. All of these, but only these, people would be invested with full decision-making power in children's lives.<sup>98</sup>

Under Kavanagh's model, other caregivers would not have full rights, but would have access rights based on their actual relationship.<sup>99</sup> Access could not be terminated unless access was harmful to the child.<sup>100</sup>

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<sup>91</sup> *Id.* at 508–09.

<sup>92</sup> *Id.* at 517.

<sup>93</sup> *Id.* at 533–40.

<sup>94</sup> Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85–86 (2004).

<sup>95</sup> *Id.* at 114.

<sup>96</sup> *Id.* at 117.

<sup>97</sup> *Id.* at 127 (emphasis omitted).

<sup>98</sup> *Id.* at 128–29; see also Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 333, 364 (1995) (suggesting a primary/secondary model in the context of collaborative reproduction by the use of a written contract); June Carbone, *supra* note 1, at 1334 (criticizing the way the legal system defines a parent because that definition is often not "constitutive of the child's identity" and leads either to the involvement of people who want no part in the child's identity or to the exclusion of people who want to be involved with the child identity).

<sup>99</sup> Kavanagh, *supra* note 94, at 130.

Professor Joyce McConnell suggests the use of guardianship law as a mechanism for including additional parents, and identifies concurrent guardianship as a benefit to single parents so that a single parent who cannot rely on another parent (e.g., an uninvolved legal parent) could still benefit from the support provided by another adult.<sup>101</sup> McConnell's model focuses on the custodial parent and her needs, and this focus gives significant control to that parent while protecting the noncustodial parent's rights.<sup>102</sup> The use of the guardianship mechanism also does not permit significant instruction by the courts.<sup>103</sup>

The models presented by these scholars suggest three choices. First, Bartlett's model would accept multiple parents when, as she puts it, the nuclear family has failed, when "nuclear" is defined as the marital family.<sup>104</sup> Her model defines protected parents in terms of definitions of psychological parent, a minimum time frame, and an overall best interests standard.<sup>105</sup> Second, Young's model suggests a core parent or parents, coupled with a secondary ring of parents.<sup>106</sup> McConnell and King similarly suggest such a model with respect to single parents who are primary or sole parents and to intended parents and other parents in the reproductive technologies setting.<sup>107</sup> Finally, Kavanagh suggests a more fluid, functional approach that focuses on actual care relationships rather than a presumed core-parent or -parents model.<sup>108</sup>

While Kavanagh's flexible approach is attractive (based on current fathering patterns) some form of Young's model, recognizing a core primary parent or partnership, makes the most sense. Sustained nurture throughout the child's lifetime is what is most beneficial to the child. A core-parent model supports and encourages such a relationship of social fathering irrespective of marital status but in collaboration with another primary parent. Thus, those fathers who maintain their commitment even when not married or no longer married to the mother would be supported under this model. Once established, one should expect core parents to continue to parent and support their efforts to do so. That is the most compelling reason to support such a model and honor their ability to parent and make decisions on behalf of their children.

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<sup>100</sup> *Id.* at 131.

<sup>101</sup> Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 30 (1998).

<sup>102</sup> *Id.* at 60–61.

<sup>103</sup> *Id.* at 66. June Carbone has suggested that we should separate identity from care obligations, and that these two functions could be performed by two different people, rather than the same person. She argues parentage should be about identity. Carbone, *supra* note 1, at 1334.

<sup>104</sup> Bartlett, *supra* note 85, at 882.

<sup>105</sup> *Id.* at 946–48.

<sup>106</sup> Young, *supra* note 89, at 518, 554.

<sup>107</sup> McConnell, *supra* note 101, at 30; King, *supra* note 98, at 333.

<sup>108</sup> Kavanagh, *supra* note 94, at 117.

A second reason to support Young's model is to clearly delineate the difference between full fatherhood and partial fatherhood. Many fathers are not fully engaged in the lives of their children, while others are fully engaged but unrecognized. A core-parent model permits the nurturing father who is not a coparent to remain recognized, and his relationship protected but not given the rights of the core parent, when disagreements arise. Another pattern of our current context is a series of social fathers: for example, a marital father, then a stepfather; or a non-marital father, then a marital father, then a stepfather; or a series of boyfriends who may have no biological or marital link. Each of the social fathers, if they are true fully engaged fathers, might be a core or secondary parent, but this model permits recognition of these fathers, most likely as secondary parents to the mother as the primary parent. Finally, the purely biological father or the disengaged father is not a rights holder, although he may have responsibilities. This model of multiple-parenting should support sustained relationships while at the same time demanding the nurture that matters to the child and any other core parent. Fathers who disengage from their children would lose their status as a core parent.

Coequal parenting is not the norm, nor is collaborative parenting, either outside of marriage or inside it.<sup>109</sup> These inequalities should not be ignored. My definition of nurture does this by its quantitative, as well as qualitative, components. In addition, a model for multiple parents must face the necessity of decision making when the parents disagree, or even the allocation of decision making so that not every minute decision of parenting is subject to discussion and input by multiple parents. Everyday, small decisions should be left to the primary parent(s); big decisions (education, religion, activities, handling disabilities, etc.) also ultimately must be for the core parent(s) to make, hopefully in consultation with other coparents.<sup>110</sup> The role of primary parent(s) should be a combination of fiduciary responsibility and decision-making authority.

#### IV. IMPLEMENTING THE MODEL

At least three issues might be considered about this multiple-parenthood model. First, how would financial responsibility be allocated? Second, would multiple-parenthood adversely affect promoting nurturing fatherhood? Finally,

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<sup>109</sup> DOWD, *supra* note 4, at 81–86. “[F]athers, in general, do far less parenting work than mothers, and most men view their parenting involvement as discretionary. Highly involved fathers are an anomaly.” ARENDELL, *supra* note 47, at 2. Although total work hours of mothers and fathers is roughly equal, “women still do twice as much housework and child care as men.” Robert Pear, *Married and Single Parents Spending More Time With Children, Study Finds*, N.Y. TIMES, Oct.17, 2006, at A12.

<sup>110</sup> This is similar to the single custodial-parent model advocated by Joseph Goldstein, Anna Freud & Albert J. Solnit, in *BEYOND THE BEST INTERESTS OF THE CHILD*. *Id.* at 37–39 (The Free Press 1979).

what do other examples of multiple-parenthood teach us about this proposal? I address each of these issues briefly in this section.

### *A. Financial Responsibilities*

One issue with respect to multiple-parenthood is the distribution of financial responsibility. The rights and responsibilities of parenthood need not be inexorably connected. To the contrary, rights and responsibilities can be separated. This is particularly the case with respect to financial support of children.

One model of financial responsibility would consist of equal shares, dividing responsibility between all who we would recognize as parents. Alternatively, those identified as the core parents would have the sole financial responsibility for children, as a defining characteristic of core parenthood, or as a complementary obligation to their acts of nurture (or even as part of the definition of nurture). Yet a third model would apportion responsibility between core and secondary parents, with the greater burden on the core parents. Another model would rest financial responsibility on genetic ties, modified perhaps by intent in the case of reproductive technologies or trumped by adoption. Finally, financial responsibility might rest on household arrangements: those who live with children would be responsible, to some degree, for their financial sustenance, much like the current model for stepparents. Whether only marital fathers would be responsible under this model, or all cohabitants, or only those who sustain a social father relationship, is also an open question. Another factor to be considered in this equation is the allocation of responsibility for children when new families are formed or dissolved—should the responsibility for children be a constant, or should the presence of new children change the equation? If the relationship changes, from a marital father with some social involvement to a divorced father whose relationship with children attenuates, should financial responsibility change?<sup>111</sup>

The patterns of current support link to the relationship with the mother: when that relationship is good, and especially when a household is shared, economic support is more likely to be provided.<sup>112</sup> When relationship is

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<sup>111</sup> On fathers and child support generally, see David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575 (1995).

<sup>112</sup> Custodial parents who had been married were substantially more likely to receive full child support payments than those who had never married. See CHILDREN'S DATA BANK, CHILD SUPPORT RECEIPT, available at <http://www.childrendatabank.org/indicators/84chldsupport.cfm>. Frequency of visits with the child and involvement in decisions related to the child also play a role in the payment of support. Judith A. Seltzer, *Relationships between Father and Children Who Live Apart: The Father's Role after Separation*, 53 J. MARRIAGE & FAM. 79, 88–89 (1991).

maintained with the child, support is also more likely to be paid.<sup>113</sup> If social fathers are supported in their relationships with children, we might hope that children will benefit economically from that sustained relationship.

The bigger question with respect to support is facing the dire economic circumstances of the appalling number of children in poverty,<sup>114</sup> and the limited resources available from any definition of father—biological, marital, social, core or secondary. Multiple-fatherhood ought not be supported as a means to resolve this crisis of child poverty, as it in no way addresses root causes including class and race. Social fatherhood should be supported because it fosters children's non-economic nurture needs.

On the other hand, social fatherhood, singly or multiply, ought not to remove responsibility for children. As I have advocated elsewhere, economic responsibility ought to follow genetic connection unless another responsible party has taken on that core responsibility.<sup>115</sup> That responsibility should remain until adulthood, irrespective of social connection, but it should not entitle an adult to access or relationship if the adult has failed to create a relationship.

### *B. Is Exclusivity Essential to Nurture?*

A second issue is whether the adoption of multiple-parenthood would undermine efforts to support and strengthen fatherhood as a nurturing ideal. The temptation is to consider exclusivity as essential or important to nurture. I suspect that temptation comes from underlying assumptions about masculinity that imagine shared fatherhood as the antithesis of the masculine ideal of traditional fatherhood.<sup>116</sup> Certainly within the genetic definition of fatherhood

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<sup>113</sup> Seltzer, *supra* note 112, at 88–89.

<sup>114</sup> In 2005, 39% (or 28.4 million) of US children lived in low-income families (0–200% of Federal Poverty Level), 18% lived in families below the Federal Poverty Level. NATIONAL CENTER FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: BIRTH TO AGE 18, *available at* [http://www.nccp.org/media/lic06b\\_text.pdf](http://www.nccp.org/media/lic06b_text.pdf). Fifty-one percent of the children living in low-income families lived with single parents. *Id.* Sixty-one percent of black and Latino children lived in low-income families compared to 26% of white children. *Id.*

<sup>115</sup> Dowd, *supra* note 32, at 937.

<sup>116</sup> The common law image of fatherhood was children as property and marriage as protection of one's family unit from claims of parenthood by biological or social fathers. The biological view of fatherhood reinforces a sense of a tangible link that establishes a "claim" for fatherhood that reinforces the claim of exclusivity to one's spouse as a "right" in the common law tradition of marriage and parenthood. While much of the common law norms have been challenged in view of the adoption of gender-neutral, egalitarian norms, the sustaining of a single place for fathers reinforces a view of men as rivals instead of partners when the social context presents the scenario of shared parenting.

For an extended discussion of dual paternity, and a reflection of the concerns of potential conflict and disruption from shared fatherhood, see Valerie Seal Meiners,

is the powerful assumption that it makes a difference if a man can identify a child as “mine.” A sense of possession, ownership or control is what drives resistance to men collaborating as multiple fathers.<sup>117</sup>

The greatest impediment to fathers, however, is not the challenge of other men nurturing their children, but rather the difficulty of being nurturers due to the combination of lack of socialization or affirmative education and modeling, as well as the barriers to parenting because of an employment structure that remains hostile to parenting, particularly for men.<sup>118</sup> Masculinity is a convenient excuse when structural and social barriers are most prominent in limiting the opportunity for men to nurture their children, or at the very least, making nurture exceptional rather than ordinary.<sup>119</sup>

If multiple-parenthood was defined in a way that diminished the expectation of nurture that I have insisted on as the definition of fatherhood, then indeed it would be harmful to a nurturing ideal for fatherhood. But if the support of multiple-fatherhood strengthened the recognition of men’s nurture and encouraged their engagement in collaborative parenting, then giving formal recognition to informal patterns that already exist can only be beneficial, not hurtful.

### *C. Lessons from Other Family Law Structures and Rules*

The construction of multiple parenting as a legal status can benefit from existing models of multiple parenting in family law. These include joint custody (both joint legal and joint physical); open adoption; and third-party visitation (grandparent statutes or more wide open statutes). In addition, we might look at the changes in the legal treatment of what are loosely called “non-traditional” or “alternative” families, including cohabitants, non-marital fathers, and same-sex couples. What is useful to consider about each of these other structures, policies or frameworks is the reasons why they came into being, their purpose, and how they function on the ground, to see what lessons they might have for constructing legal recognition of multiple parents, and

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Comment, *The Child with Two Fathers: Updating the Wisdom of Solomon*, 46 LA. L. REV. 1211 (1986).

<sup>117</sup> The extreme instances of harm due to this reinforcement of rights and exclusivity is evident in litigation over naming, *see e.g.*, *Gubernat v. Deremer*, 140 N.J. 120 (1995), where denial of the right to name the child, *id.*, influenced the father to murder the child and then commit suicide. *See* Clifford J. Levy, *Father Kills His Son, 3, Then Himself*, N.Y. TIMES, May 16, 1995, at B5; as well as the killing of children in domestic violence cases, *see, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 754 (2005).

<sup>118</sup> DOWD, *supra* note 4, at 48–57, 182–202. The major focus of family law has been upon supporting economic fatherhood, not nurture.

<sup>119</sup> On the work/family structural barriers for fathers, *see id.* at 48–57; Selmi, *supra* note 54, at 759; Malin, *supra* note 54, at 1089.



more particularly, multiple fathers. There is much to explore, and what I suggest here is very preliminary.

Joint custody has been a subject of great controversy, and custody structures in general remain one of the most difficult and contested areas of family law.<sup>120</sup> The goal of custody post divorce has been the best interests of children, and those interests have most recently been defined as perpetuating the relationship with both parents.<sup>121</sup> The concept of the post-divorce family, that is, a family that remains linked by ties to children even if the adult tie of marriage no longer exists, is fairly recent. Single parents and “broken” families continue to be pejorative, negative labels placed on families who experience divorce. For many families, it is a struggle to sustain the post-divorce family in a positive way. Nevertheless, when the post-divorce family is successful, that is, when the parent-child relationships are sustained and consistent, we know that children benefit. The value of joint custody, then, might be to demonstrate how successful relationships benefit children, and what factors contribute to success when the parents no longer share a household. At the same time, the pitfalls of joint custody should be avoided, particularly where genetic and marital links generate status that is not matched by social parenting.

Joint custody also functions within a relatively high remarriage rate, and thus the presence of stepparents in the household.<sup>122</sup> Thus, it provides an insight into successful multiple parenting. The uncertain status and obligations of stepparents, in addition, provide an insight into concrete needs that multiple parents have.<sup>123</sup> Stepparents may function as core or primary parents, or they

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<sup>120</sup> See *supra* note 81 (joint custody literature). On the retreat of some states from joint custody as a norm, see Dwyer, *supra* note 72, at 911.

<sup>121</sup> See generally ALI Principles § 2.08 (2002) (discussing statutory and case law treatment of joint custody).

<sup>122</sup> In 2001, 15% of children lived in blended families, with half of those children living with a stepparent. KREIDER & FIELDS, *supra* note 1, at 2.

<sup>123</sup> See Dwyer, *supra* note 72, at 905 (arguing that, barring legal adoption of a child by a stepparent, a stepparent’s right to a relationship with a child is generally subject to a continuing marital relationship with the child’s biological parent); Gregory, *supra* note 3, at 360–61 (noting that divorce and death of the biological coparent are two common situations in which stepparent relationships are placed in jeopardy); Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents under the American Law Institute’s Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 285, 293–97 (2001) (explaining the basis for upholding stepparental rights as de facto parents even where a finding of in loco parentis cannot be supported); Alison Harvison Young, *This Child does Have 2 (Or More) Fathers . . . Step-parents and Support Obligations*, 45 MCGILL L.J. 107, 111–14 (2000) (contrasting the recent expansion of Canadian law, which recognizes that a stepparent’s status cannot be unilaterally terminated by the other parent, with American which treats stepparents as strangers); Jennifer Klein Mangnall, Comment, *Stepparent Custody Rights After Divorce*, 26 SW. U. L. REV. 399 (1997) (noting that, absent a legal adoption, a stepparent lacks the rights and responsibilities accorded a biological parent). Professor Ramsey cites statistics that indicate that 25%

may be secondary parents. Function, then, is critical, and considering the needs of stepparents as well as the way in which they function would be extremely helpful in constructing legal norms.

Open adoption suggests as many useful insights as joint custody.<sup>124</sup> As with joint custody, there is a range of actual ways in which open adoption functions. For purposes of thinking about its insights, I will define it as an adoption in which birthparents and adoptive parents are known to each other, and where some relationship exists post adoption between birthparents and children, ranging from minimal contact to secondary parenting, or where parental relationships are established after the child or children reach adulthood. The open-adoption model suggests primary or core parents as the adoptive parents, and birthparents as genetic parents who may have some relationship role to the children, although often falling short of a parental relationship. In some respects, the open-adoption model suggests that the secondary role of birthparents is more like the role of aunts and uncles, or grandparents, in the traditional family structure. Because of the power of the genetic connection, birthparents have a critical and unique place in the lives of adopted children.<sup>125</sup> At the same time, adoptive parents and children need to feel secure in their relationship, and because adoption severs the legal parent-child relationship, birthparents do not act as coparents. Rather, the model has evolved to challenge the historic secrecy attached to adoption and recognize the importance of the links to family, ethnic and community history through biological links.<sup>126</sup> To the extent social relationships flourish, they are positive for children.<sup>127</sup> But the model is one that is quite fluid, driven by the ebb and flow of adoption practice in the shadow of, and in spite of, the law.<sup>128</sup> Open-

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of children will be part of a stepfamily by marriage; if cohabitation is included, the percentage would be considerably greater. Ramsey, *supra*, at 287. As she also notes, stepfamilies come in a variety of forms, including fifteen variations set out by one researcher. *Id.*

<sup>124</sup> On open adoption generally, see American Adoptions, Open adoptions, [http://www.americanadoptions.com/adopt/open\\_adoption](http://www.americanadoptions.com/adopt/open_adoption) (last visited March 23, 2007); Naomi Cahn, *Birthing Relationships*, 17 WIS. WOMEN'S L. J. 163, 187-88 (2002) (discussing open adoption's potential to allow multiple parties to share the raising of a child to varying degrees and in keeping with the best interests of that child); Amy L. Doherty, *Foster Care and Adoption: A Look at Open Adoption*, 11 J. CONTEMP. LEGAL ISSUES 591, 593-93 (2000) (explaining possibilities for structuring an open adoption, allowing for various levels of contact for birth parent involvement where adoptive parents maintain the role of primary parents to a child).

<sup>125</sup> Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 173 (1999).

<sup>126</sup> *Id.* "All of us need to know our past, not only for a sense of lineage and heritage, but for a fundamental and crucial sense of our very selves: our identity is incomplete and our sense of self retarded without a real personal historical connection." In *Application of Maples*, 563 S.W. 2d 760, 767 (Mo. 1978).

<sup>127</sup> Cahn & Singer, *supra* note 125, at 182.

<sup>128</sup> *Id.* at 182-83.

adoption agreements are not reliably enforced,<sup>129</sup> so the other piece of the open-adoption model is the lack of legal support, and therefore informal arrangements work only so long as parties do not claim legal backing. Open adoption might also provide a model for the question of the possible relationship between genetic and other parents, when the genetic parent is not a social parent. It might suggest, in fact, that a relationship can be present and supported on the model of third-party visitation, not of recognition of full-fledged parental status.

Yet another model for multiple parenting is foster parenting, particularly in light of the tendency toward long-term foster care, although foster parents retain few if any rights if children are permanently placed or returned to their birth families.<sup>130</sup> In the foster care structure, biological parents and potential adoptive parents may be additional parents in the picture along with the foster parents. As with adoption at or near birth, the primary or core parent changes. The birthparents may be treated like birthparents in traditional adoption or they may be denied contact or responsibility due to abuse or neglect. The foster and adoptive parents, however, may remain as ongoing multiple parents, or the foster parents may not choose to pursue an ongoing relationship with children. Foster parenting provides an insight, however, into how children function with

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<sup>129</sup> Twenty-two states prohibit open adoptions. See Amy L. Doherty, *Part Nine: Foster Care and Adoption: A Look at Open Adoption*, 11 J. CONTEMP. LEGAL ISSUES 591, 594 (2000). Eight states allow private open-adoption agreements, but will not enforce the provisions through court action. *Id.* Eight states enforce agreements reflected in the adoption decree. *Id.* Twelve states have no clear open adoption policy. *Id.*

<sup>130</sup> Gregory, *supra* note 3, at 368–69. On foster parenting generally, and particularly including the challenges of long-term foster care and aging out of the system (suggesting that the current regime is not one to follow and faces similar needs for rethinking exclusive parenthood), see: Susan L. Brooke, *The Case for Adoption Alternatives*, 39 FAM. CT. REV. 43, 46–47 (2001) (discussing the current child welfare system's focus on adoption, to the exclusion of options allowing other interested parties, including kin and foster parents, to parent or otherwise play a role in a child's upbringing); Alice Bussiere, *Adoption and Foster Care: Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231, 233 (2006) (noting that child welfare policy is sometimes responsible for severing the most beneficial ties for children, including those with former foster parents); Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFFALO L. REV. 835 *passim* (2000) (discussing extensively how a multiple-parent model can assist older children in the foster care system with the transition to adult life as they prepare to "age out" of the system); Stephanie Moes, *Being Seen and Heard: Webster v. Ryan's Constitutional Protection for Children's Right to Maintain Contact with Foster Parents*, 71 U. CIN. L. REV. 331, *passim* (2002) (exploring the recognition in one family law court of a child's constitutional right to remain in the care of a parent-like figure, such as a foster parent, to whom he is already attached).

multiple and/or serial parents, and what structures serve them best to ensure their resilience and development.

All of these frameworks thus far suggest the value of the concept of visitation over the designation of parent.<sup>131</sup> A functional framework for visitation includes not only those recognized as legal parents but also those other parties who have a parental or parental type link to children, whose relationship should be sustained in the child's best interests. Multiple parenting as a concept may therefore also need to comprehend a status for those individuals who are neither primary/core parents nor secondary parents, but who nevertheless have a social relationship that merits support from the family law system. Grandparents, aunts and uncles, and/or cohabitants may all assist parents and maintain unique and valued relationships with children. They may not, however, qualify under doctrines of psychological or de facto parent, although their role and relationship is profound and significant. This suggests a status outside of "parent" that would be given legal support, although still subject to the stronger claims of core/primary parents and secondary parents.

Two other areas of change and flux in family law suggest the importance and ability to take a functional approach to multiple parenting: cohabitation and non-marital fatherhood.<sup>132</sup> The treatment of cohabitants, especially those who have had children together, is moving toward treating them as functionally married.<sup>133</sup> The treatment of non-marital fathers has moved toward treating them as functionally equal to divorced fathers.<sup>134</sup> The functional approach has been grounded for cohabitants in the increasing degree of non-marital coupling and childbearing, and a sense that the parties have detrimentally relied, even if mistakenly, on the notion that they will divide things fairly and provide some level of support to each other based on mutual dependency.<sup>135</sup> The treatment of non-marital fathers reflects a change in men's views of themselves as fathers outside of marriage even when they have never been married, as well as links to gender equality norms.<sup>136</sup>

One final area of comparison for multiple-parenthood may be the evolution of doctrines within family law for same-sex couples, the political

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<sup>131</sup> See *supra* note 3.

<sup>132</sup> See *supra* notes 63-64 and 77-78.

<sup>133</sup> Garrison, *supra* note 77, at 818.

<sup>134</sup> DOWD, *supra* note 4, at 118.

<sup>135</sup> Garrison, *supra* note 77, at 835-36.

<sup>136</sup> DOWD, *supra* note 4, at 115-21; see also Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 UC DAVIS L. REV. 991, 1004-07 (2006) (discussing non-financial contributions of non-marital African-American fathers for children); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 127-28 (2006); Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of her Child*, 48 ARIZ. L. REV. 97, 122-26 (2006) (discussing biological father's right to block adoption).

controversy over same-sex marriage and gay adoption, and controversies over custody and parental rights when one parent is gay and the other is straight.<sup>137</sup> Functional families and functional parents have been denied legal protection because of sexual orientation under traditional family law, but those families have creatively used available doctrines to protect relational ties.<sup>138</sup> Function has defied not only a lack of legal status but also outright hostility and stigmatization. It is important to note, however, that the effort generally has been to establish the rights of *two* parents, not of multiple parents as I have defined it here. At the same time, the same-sex example can be read as identifying a key assumption of multiple-parenthood, and even of this essay: the idea that there are identifiable parental roles. As I have pointed out previously, since I identify the core/primary parent as either one or more parents, I do not envision core parenthood as limited to, nor as necessitating, two parents.

One can read the record of development of doctrines to protect same-sex couples and children as suggesting that creating new categories is the wrong way to go: there are existing doctrines and categories that could better be used.<sup>139</sup> The creative use of what is already there allows greater personal, private control rather than detailing a new scheme. All the variations of

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<sup>137</sup> On same-sex parenting issues generally, see David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 537–42 (1999) (discussing the treatment of gay adoption); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629–59 (1989) (discussing custody and visitation, adoption and foster care, and procreating and parenting); Melanie B. Jacobs, *Applying Intent-Based Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 442–47 (2005) (discussing the application of intent-based parenting to non-legal lesbian coparents); Heather Farm Latham, *Desperately Clinging to the Cleavers: What Family Law Courts Are Doing About Homosexual Parents, and What Some are Refusing to See*, 29 LAW & PSYCHOL. REV. 223, 227–33 (2005) (discussing society's fears about gay and lesbian parenting); Kimberly D. Richman, *(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases*, 30 LAW & SOC. INQUIRY 137, 152–57 (2005) (reviewing case law of the parental rights of gays and lesbians); D. Ronner, *Gay and Lesbian Adoption: Banishing the Pied Piperamy*, 18 ST. THOMAS L. REV. 207, 208–11 (2005) (advocating the need for gay and lesbian adoption).

<sup>138</sup> Adoption, most notably, has been used to create legal parent-child relationships between non-biological same-sex partners and the children of their partners, and adult adoption of a same-sex partner has been used as a tool to create a legally recognized relationship for inheritance purposes.

<sup>139</sup> For example, civil unions create a category that mirrors marriage but call it by another name. For example, it gives the illusion of equality but in fact the categories are not equal. Civil unions are not recognized in all states and do not confer any federal benefits connected to marriage.

recognition for same-sex partnerships is a perfect example of the downside of creating new statutory structures.<sup>140</sup>

On the other hand, the persistent denigration of familial and relational ties of same-sex couples and families would suggest that establishing clear support and status is essential for functional parents. At the same time, some controls must exist in the structure for preventing the state from imposing or favoring a new, or revised, version of the ideal family. Any doctrine can be put to perverse use, and therefore the fear that multiple-parenthood might be used to insert or support additional parents to ensure a heterosexual norm or balance is a very real concern.

#### *D. Research Agenda: Multidisciplinary Approaches*

A final issue raised by multiple fathers or multiple parents is the sufficiency of our knowledge about multiple parenting as a base upon which to construct sound public policy and legal standards. It is possible, for example, that the core/secondary model that I have advocated here is not the best model. The patterns we have may not so much reflect a natural distribution of parenting roles that benefit children as a pattern linked to social assumptions that may or may not benefit children. Collecting available empirical data as well as encouraging the collection of further data would be enormously helpful, particularly from the disciplines of child development, sociology, and psychology. What is needed is an evaluation of data that demonstrates the most successful multiple-parenting relationships, and whether legal structures could facilitate positive relationships for children, as opposed to getting in the way. I suspect that developmental research would show that children's relationships to adults depend on how well the adult functions, not the structure or number of adults. Data on function and what facilitates positive relationships is crucial. I do not think we can put the genie back in the bottle. Multiple parenting is likely here to stay. The question is whether to facilitate it or not, and what models are most positive for children.

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<sup>140</sup> Same-sex partners may be recognized under doctrines recognizing domestic partnerships or civil unions, or may simply register as domestic partners, but only in some states. In addition, some local jurisdictions recognize domestic partners, and some employers extend benefits to domestic partners. Domestic partnership, however, is a category without a uniform meaning, such that domestic partners do not have identical benefits in various public and private settings. See NATIONAL CENTER FOR STATE COURTS, FAMILY: SAME SEX MARRIAGE: FAQs, <http://www.ncsc-online.org/wc/CourTopics/FAQs.asp?topic=SamSex> (last visited March 20, 2007) (offering data on civil union, domestic partnerships and differences between various state definitions). For updated legislative and litigation in this area, see LAMBDA LEGAL DEFENSE FUND, <http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/> (last visited April 6, 2007); ACLU, <http://www.aclu.org/lgbt/index.html> (last visited Mar. 20, 2007) (discussing issues affecting gays, lesbians, and society at large).

Paradigms in family law have often shifted without data, to our detriment.<sup>141</sup> The elimination of fault from divorce is one example; the embrace of coequal, gender-neutral parenting based on genetic ties alone is another. On the other hand, there are examples where data and practice have reoriented rules that were based on moral assumptions rather than the well being of children. Adoption is an example of this shift, where data on the psychological issues and unique developmental challenges of children, and the functioning of open adoptions, has changed the functioning of adoption from a model of secrecy, silence, and myth to a model of acknowledged connection and evolving appreciation of the role of birthparents in the lives of adopted children.

We have changed our view of what works best as a result of data on the harm of the secrecy model and the importance of knowledge, and sometimes connection, with birthparents. Our assumptions about mothers and fathers have not been borne out by the social science data either, causing important shifts in our treatment of fathers (from unstudied and inessential to significant and capable, albeit not unique or essential). We pursue research that demonstrates that mothers working (only mothers, never fathers) harms children,<sup>142</sup> while the data shows children doing well in high quality childcare and benefiting from their mothers' work,<sup>143</sup> although also indicating that the lack of structural support for parents (not their failure to stay home) harms children.<sup>144</sup> We can demonstrate well-supported parents are better workers,<sup>145</sup> although the structure of work of most employers has yet to change to reflect that.<sup>146</sup>

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<sup>141</sup> On the importance of good empirical data and the danger of overreaction to minimal studies, see Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILLINOIS L. REV. 1083 *passim* (2002).

<sup>142</sup> See Kei M. Nomaguchi, *Maternal Employment, Nonparental Care, Mother-Child Interactions, and Child Outcomes During Preschool Years*, 68 J. MARRIAGE & FAM. 1341, 1361-63 (2006).

<sup>143</sup> NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, U.S. DEPT OF HEALTH AND HUMAN SERVICES: FINDING FOR CHILDREN UP TO AGE 4 ½ YEARS, 1-2 (2006) *available at* [http://www.nichd.nih.gov/publications/pubs/upload/seccyd\\_051206.pdf](http://www.nichd.nih.gov/publications/pubs/upload/seccyd_051206.pdf).

<sup>144</sup> See Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, at 453-56, 489-93 (1991) (discussing the various kinds of stresses from work/family conflict).

<sup>145</sup> Much of the work/family literature makes the case for the bottom line business advantage of supportive work-family policies. See Ellen Alyssa Friede & Ellen Ernst Kossek, *The Business Cases: Managerial Perspectives on Work and the Family*, in THE WORK AND FAMILY HANDBOOK (Marcie Pitt-Catsoupes, et al. eds. 2006) (a comprehensive analysis of work/family issues including the impact on employee productivity). A recent study focuses on the positive health effects of reducing stress for employees linked to work/family supports. WORK, FAMILY, HEALTH AND WELL-BEING (Suzanne Bianchi, et al, eds. 2005). For examples of successful American employers recognized for their work/family policies, see the list of top employers at

When it comes to parents, we have always assumed that two is best, preferably one man and one woman.<sup>147</sup> We have stigmatized single parents because of that assumption, discouraging single parenting.<sup>148</sup> Yet well-supported single parenting is as successful as dual parenting.<sup>149</sup> And dual parenting is not an unqualified marker of success. The significance of two opposite-sex parents has also been assumed, linked to assumptions of healthy child development and learning gender roles.<sup>150</sup> This ignores the actual data on development of gender roles even as it assumes a unified gender role that is implicitly heterosexual. It ignores what we know about sexual orientation in favor of an assumption that heterosexuality can be taught, despite the reality that most gays and lesbians grew up in heterosexual families,<sup>151</sup> and the children of gays and lesbians do not follow the sexual orientation of their parents.<sup>152</sup>

Accepting multiple parents goes against the grain of these common and deeply rooted assumptions. Data is important and essential on the core issue of whether multiple parenting is good or bad, but even more important, on how multiple parenting can be done well, for the greatest good to children.

## V. CONCLUSION

In this exploration of multiple parenting in the context of multiple fathers, I have raised more questions than given answers. Given these questions and the model which I have embraced for multiple parenting, it is important to return

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*Working Mother*, <http://www.workingmother.com> (follow "Best Companies" hyperlink) (last visited Mar. 20, 2007).

<sup>146</sup> See LOTTE BAILYN, *BREAKING THE MOLD: REDESIGNING WORK FOR PRODUCTIVE AND SATISFYING LIVES* (2006) (discussing the need to restructure the workplace); Dowd, *supra* note 144, at 446–47 (discussing lack of structural support for work and family); Ellen Ernst Kossek, *Growing Tensions Between Employment Policy and a Changing Workforce in A THIRTY YEAR PERSPECTIVE*, in *AMERICA AT WORK: CHOICES AND CHALLENGES* (Edward Lawler & James O'Toole, eds. 2006) (discussing the effects of employment policies that fail to support workers with families).

<sup>147</sup> Bartlett, *supra* note 85, at 880–83.

<sup>148</sup> DOWD, *supra* note 66, at 4.

<sup>149</sup> *Id.* at 108–12.

<sup>150</sup> *Id.* at 27–38.

<sup>151</sup> The estimates of the occurrence of homosexuality in the population are approximately 10–15%; thus, most gay and lesbian children grow up in straight households and a major issue in their sexuality is often coming out to their parents. AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, *GAY, LESBIAN AND BISEXUAL ADOLESCENTS*, <http://www.aacap.org/page.ww?section=Facts+for+Families&name=Gay%2C+Lesbian+and+Bisexual+Adolescents> (last visited Mar. 20, 2007).

<sup>152</sup> Mike Allen & Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32(2) J. OF HOMOSEXUALITY 19, 30 (1996).



to where I began, by evaluating how multiple parenting fits against Schneider's articulation of the channelling function of family law, and my principles of antisubordination and limited instrumentality.

The channelling function of family law is the means by which the law "recruits, builds, shapes, sustains, and promotes social institutions."<sup>153</sup> The model that I have outlined for multiple parents fits into Schneider's example of supporting a status (parenthood) by redefining that status around nurture and care, and allowing for multiplicity. The social value involved is the wellbeing of children and the value of care, together with the recognition that how care functions is not defined by the number two. Schneider used parenting as one of his examples of the law's channelling function.<sup>154</sup> Under multiple parenting, one who is a parent is still rewarded and supported, but the status is based on conduct rather than genetic or marital connection, and the presence of multiple parents is not pushed away by a dual-parent model. A cautious approach would be to utilize existing doctrine to support multiple parenting. A more radical approach would be to embrace multiple parenting with an emphasis on functional parenting defined around nurture that demands of parents all that children deserve.

I have further argued that we should be cautious about law's relationship to culture. Under the principle of *antisubordination*, the issue is whether the adoption of a system of legal rules to support multiple fathers, or more generally, multiple parents, would subordinate some families or children. Arguably, the purpose of adopting rules that permit multiple parents is designed to do exactly the opposite. The intention is to better support the actual nurturing relationships between children and parents, and also to recognize the variations in nurture that make all potential parents not equal. By defining parenting as nurture, and concretely defining what nurture is, and by recognizing the importance of a primary parent or parents, the model I have proposed aims to support multiple relationships while demanding that the parents engage significantly in social parenting in order to be legally supported as a primary or secondary parent. In addition, since my definition of nurture requires cooperative, collaborative relationships with other caregivers, it is sensitive to efforts to use care as a tool to subordinate other caregivers. Exercising power *over* another is not nurture.

Given the asymmetric parenting patterns of mothers and fathers, does this subordinate either? That is, might the support of multiple parents undermine the position of mothers even further, along the lines of the unintended consequences of gender neutrality principles in family law coupled with preferences for some form of joint custody. If the principle of nurture is sufficiently robust, then neither mothers nor fathers should be subordinated. Mothers, who currently perform more caregiving, might find themselves more strongly supported as the sole primary parent if the father or fathers only

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<sup>153</sup> Schneider, *supra* note 6.

<sup>154</sup> *Id.*, at 500.

perform in a secondary role. That would be a stronger position than under current gender neutrality norms. Fathers who do nurture their children, on the other hand, would be more strongly supported within the family law system because their conduct would be more measurable and legally supported. For both mothers and fathers, this model fosters collaborative approaches, and at the same time would not foster unintended intervention because it requires cooperation among caregivers as part of the definition of nurture.

Under the principle of *limited instrumentality*, the question is whether supporting multiple-fatherhood would put the law ahead of cultural values. This might seem to be an easy answer, because multiple-fatherhood is already being practiced. One can argue that there is no problem in this respect; law is simply reflecting an existing reality and supporting it more fully. On the other hand, fatherhood is a contested and difficult subject. Concerns over the extent of fatherlessness for children are significant; and fathers' rights groups argue the system is biased against them. If multiple-parenthood is understood as relieving men of their responsibilities then legal support for such a notion will be resisted by the culture. If multiple-parenthood is seen as interventionist, the state inserting and supporting additional parents in derogation of the traditional marital nuclear family, this also might be resisted by the culture as contrary to valued norms of family privacy. Multiple-parenthood is most in harmony with cultural values when it captures the reality of valued care to children. In that sense law is not ahead of culture but behind it, supporting what is already socially valued care.

